In the High Court of Uttaranchal, at Nainital.

Chapter VIII, Rule 32 (2) (b)

Description of Case.

W. P. No. 14/2004(M/B)

S.K.Agarwal

Vs.

The Oriental Bank of Commerce

Dated of decision: 05th Oct., 2004

For the approval of :

Hon'ble Mr. Justice Irshad Hussain, J.

Hon'ble Mr. Justice J.C.S. Rawat, J.

- Whether the order/judgment should be Sent for reporters for reporting ?

- Whether the reporters be allowed to See the judgment ?

ISB

In the High Court of Uttaranchal, at Nainital.
Writ Petition No. 14 of 2004 (M/B).

S.K. Agarwal … Petitioner.

Vs.

The Oriental Bank of Commerce and others …… Respondents.

Sri Vibhu Vakhara, and Sri Alok Singh, Senior Advocate, learned counsel for the petitioner.
Sri Ashish Joshi, learned counsel for the respondents.

Dated: 5th October 2004

Coram: Hon'ble Mr. Justice Irshad Hussain, J.
Hon'ble Mr. Justice J.C.S. Rawat, J.

P.C: (Hon'ble Mr. Justice Irshad Hussain, J.):

The petitioner, a Promoter/ Managing Director of a company which has been declared a sick industrial unit and for whose financial assistance and facilities he gave personal guarantee, has impugned notice under Section 13(11) of The Securitisation and Reconstruction of the Financial Assistance and Enforcement of Security Interest Act, 2002 (for short 'Act 54 of 2002') served on him by the secured creditor, respondent Oriental Bank of Commerce.

2- The short facts of the case and which are not disputed are that M/s Superior Carbonate and Chemicals Ltd. (for short 'Company) was granted cash credit facility with second charge over the fixed assets of the Company by the respondent bank and the financial facility was secured with personal guarantee by the petitioner and his properties detailed in the impugned notice dated 18-11-2003 were accordingly charged to the bank as a security. The Company suffered losses and reference was made before the Board of Financial and Reconstruction (for short 'BIFR') and presently the rehabilitation package is under preparation. The first charge over the entire fixed assets of the Company is with the I.D.B.I. another secured creditor which had given substantial credit facilities to the Company. The respondent bank with a view to enforce the security under guarantee decided to resort to the provision of the 'Act 54 of 2002' and sent notice under Section 13 (11) of the Act on 18-11-2003 showing the

total outstanding dues at Rs. 1,10,42,548=02 and the said notice has been impugned in this petition.

3- The validity of the impugned notice is challenged, inter alia, on the grounds that the same is illegal as being in the teeth of provision of Section 22(1) of Sick Industrial Companies (Special Provision) Act, 1985 (for short 'SICA') as no consent of the 'BIFR' has been taken by the respondent bank; that Section 13(11) of 'Act 54 of 2002' does not confer any additional power on the secured creditor which also does not apply to immoveable property charged to the respondent by the petitioner and that the impugned action against the petitioner is arbitrary and discriminatory.

4- In the counter affidavit the respondent bank raised the contentions that the petitioner being a guarantor has no right to take the advantage/protection under Section 22(1) of 'SICA'; that the agreement of guarantee has a specific clause No.12 which entitle the respondent bank to enforce the guarantee without first enforcing, selling or realizing any of the securities kept by the borrower lien, hypothecated, pledged or mortgaged with it; that the steps have already been taken for symbolic possession of the properties charged on 15-7-2004 which has been duly received by the petitioner and that the petitioner has no locus to file the writ petition challenging the validity of the notice under Section 13(11) of the Act 54 of 2002.

5- On the facts of the case the question which arose for consideration in this petition is "as to whether the respondent- bank would been entitled to proceed against the guarantor by invoking the provisions of Section 13(11) of the Act 54 of 2002 ?."

6- Learned counsel for the petitioner sought to assail the validity of the notice impugned on three counts. Firstly that Section 13(11) of Act 54 of 2002 does not confer any additional power to proceed against the guarantor and mortgaged assets because under the provision a secured creditor is entitled to proceed against the guarantor for selling the pledged assets without first taking any steps under Section 13(4) against the borrower. Secondly Section 13(11) apply to pledged assets and not to secured assets as has been argued by the respondent bank in view of their giving detail of the mortgaged assets in the impugned notice (Annexure P-1) as the expression

'pledged' as defined under Section 172 of the Indian Contract Act shall have the same meaning for the purposes of Act 54 of 2002 by virtue of sub-section (2) of Section -2 of the said Act and in that event the impugned notice to proceed to sell pledged/hypothecated/mortgaged assets does not conform to the expression 'pledged assets' as contemplated by Section 13(11) of Act 54 of 2002. Thirdly the notice is illegal in view of the reference pending before the 'BIFR' and by virtue of Section 22(1) of 'SICA' no proceedings against the property of the guarantor can be initiated. Learned counsel also placed reliance on the reported decision in the matter of **Patheja Bros Forgings & Stamping v. ICICI LTD.; (2000) 6 Supreme Court Cases 545.**

7- On the other hand learned counsel for the respondent bank urged that the power given under Section 13(11) of Act 54 of 2002 is independent which clearly provide that the power to proceed against the guarantor is without prejudice to the rights conferred on the creditor under or by this Section; that the expression 'pledged assets' in the said provision can not be interpreted to create a bar to proceed against the guarantor in respect of immoveable property charged by way of pledge, hypothecation or mortgage and that Section 22(1) of 'SICA' does not afford any protection to guarantor against recovery proceedings. Learned counsel pressed into service the decision of the Apex Court in the matter of **Kailash Nath Agarwal and other vs. Pradeshiya Industrial & Investment Corporation of U.P. Ltd. and another; (2003) 4 Supreme Court Cases 305.**

8- At the out set it need to be stated that the provisions of the 'Act 54 of 2002' enable the bank and financial institutions to realize the debts by adopting measures as provided therein. Chapter –III of the Act 54 of 2002 pertain to enforcement of security interest and sub-section (11) of Section 13 under this chapter provide a mode to proceed against the guarantor to take possession of the securities. Section 13(11) reads as under:-

> "Without prejudice to the rights conferred on the secured creditor under or by this Section, the secured creditor shall be entitled to proceed against the guarantors or sell the pledged assets without first taking any of the measures specified in

clauses (a) to (d) of sub-section(4) in relation to the secured assets under this Act."

9- The provision as contained in the above Section leave no manner of doubt that a secured creditor has been given option to proceed against the guarantor without first taking any of the measures for enforcement of security interest against the borrower. The respondent bank has second charge over the fixed assets of the borrower Company but as first and exclusive charge over the properties charged to the bank by the petitioner as guarantor regarding which agreement of guarantee (Annexure –C.A.-1), was executed between the parties on 23rd April 2001 and the petitioner has signed the document with respect to the mortgage of the immoveable property on 17-6-1998 (Annexure –C.A.-2). Considering the language of the above provision of Section 13(11) and the agreement executed between the parties we are of the firm view that additional power on the secured creditor has been conferred to proceed against the guarantor which necessarily imply that the secured creditor shall have also option to proceed against the property charged to the secured creditor by the guarantor by way of pledge/hypothecation and mortgage. The words 'pledged assets' in Section 13(11) can not be interpreted with reference to the expression 'pledge' as defined under Section 172 of the Indian Contract Act to mean that the secured creditor has been given power to only proceed to sell the moveable assets of the guarantors which is not the case here as the property given by way of security and charge are immoveable properties. The Section in fact gives power to secured creditor to proceed against the guarantor in an appropriate manner or may also sell the pledged assets which have been charged by way of security. In fact the respondent bank rightly proceeded to give notice which refer the immoveable properties charged to respondent bank by way of security by the guarantor.

10- In so far as the third limb of the argument of the learned counsel for the petitioner it need to be stated that Section 22(1) of 'SICA' provide protection to the guarantors against any suit which can be filed for enforcement of a guarantee but it does not afford any protection against the recovery proceedings which may be initiated

without resorting to filing a suit in a court. The controversy raised stand settled by the decision of the Apex Court in Kailash Nath Agarwal Case (supra) relief upon by the learned counsel for the respondent and wherein it has been held that the word 'proceedings' used in Section 22(1) need to be widely construed to include proceedings for recovery initiated by any legal mode other than by way of preferring a suit in a court. In the case before the Apex Court the proceedings for recovery of dues by State Financial Corporation as arrears of land revenue were initiated against the guarantor and the same were not found to be prohibited by Section 22(1) of 'SICA' in view of the fact that the words ' suit' and 'proceedings' have different meanings. The Apex Court also distinguished the decision Patheja Bros case (supra) by observing that till 1994 no protection was afforded to the guarantor under the 'SICA' at all and a limited protection has been given in 1994 and the expression being clear and unambiguous it is not for the Supreme Court to question the wisdom of the legislature in giving the limited protection it did or why such protection was necessary at all. As stated above the limited protection was in regard to filing of suit in a court of law against the guarantor. But in view of 1994 amendment in Section 22(1) of the 'SICA' the recovery proceedings against the guarantor may be initiated by a mode other than a suit in a Court. Therefore, none of the submission on behalf of the petitioner has any merit.

11- For the reasons aforesaid the petition is liable to be dismissed. The writ petition is dismissed. No order as to costs.

(J.C.S. Rawat, J.) **(Irshad Hussain, J.)**

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